Supreme Court, U.S.
FILED
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No.

IN THE
Supreme Court of the United States

ABU BENIN,

Petitioner

v.

HOME SAVINGS OF AMERICA, FSB, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ABU BENIN
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Los Angeles, California 90047
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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Ninth Circuit erred in its decision to affirm the district court's judgment because the district court has subject matter jusirdiction over violations of the United States Constituiton and federal banking laws and had the power to act on the case?

II. Whether the United States Court of Appeals for the Ninth Circuit should not have affirmed that David Doi and Susan Isacoff are immune from prosecution because David Doi and Susan Isacoff lacked subject matter jurisdiction in the underlying unlawful detainer case, their actions were "under color of state law", and the district court had jurisdiction to pierce their judicial immunity?

A. Whether David Doi and Susan Isacoff are not immune from prosecution because they lacked subject matter jurisdiction in the underlying unlawful detainer case?

B. Whether David Doi and Susan Isacoff should not be immune from prosecution because their actions were "under color of state law", and the district court had jurisdiction to pierce their judicial immunity?

III. Whether the United States Court of Appeals for the Ninth Circuit erred when it affirmed that the remaining respondents are not state actors for the purpose of the petitioner's 42 U.S.C. §§ 1981, 1983, 1985 and 1986 redressable claims because the district court had jurisdiction to deem them to be state actors?

IV. Whether the United States Court of Appeals for the Ninth Circuit abused its discretion when it failed to mandate that the district court sanction all the respondents and their attorneys for Rule 11 violations under the Federal Rules of Civil Procedure because the district court had the jurisdiction to sanction them?

LIST OF PARTIES

HOME SAVINGS OF AMERICA, FSB;
H.F. AHMANSON & CO., a holding company;
GEOFFREY G. OLSEN, an individual,
MAXWELL L. JOUANICOT, an individual;
MCKINLEY & CAPELOTO, a general partnership;
J. SHELDON CAPELOTO, an individual;
DANIELLE D. CYR, an individual;
ELIZABETH A. LOSSING, an individual;
PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY (PRUPAC), a corporation;
PRUDENTIAL INSURANCE COMPANY OF NORTH AMERICA, a holding company;
BERGER, KAHN, SHAFTON, MOSS, FIGLER, SIMON & GLADSTONE, a professional corporation;
PATRICK E. NAUGHTON, an individual;
JULIE R. BEATON, an individual;
DAVID DOI, an individual;
SUSAN E. ISACOFF, an individual; and
DOES 1 through 50, inclusive,

Respondents.

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II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD NOT HAVE AFFIRMED THAT DAVID DOI AND SUSAN ISACOFF ARE NOT IMMUNE FROM PROSECUTION BECAUSE DAVID DOI AND SUSAN ISACOFF LACKED SUBJECT MATTER JURISDICTION IN THE UNDERLING UNLAWFUL DETAINER CASE, THEIR ACTIONS WERE "UNDER COLOR OF STATE LAW", AND THE DISTRICT COURT HAD JURISDICTION TO PIERCE THEIR JUDICIAL IMMUNITY 5

A. David Doi and Susan Isacoff are not immune from prosecution because they

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B. David Doi and Susan Isacoff should not be immune from prosecution because their actions were "under color of state law", and the district court had the jurisdiction to pierce their judicial immunity. 6

III. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED WHEN IT AFFIRMED THAT THE REMAINING RESPONDENTS ARE NOT STATE ACTORS FOR THE PURPOSE OF THE PETITIONER'S 42 U.S.C. §§ 1981, 1983, 1985 AND 1986 REDRESSABLE CLAIMS BECAUSE THE DISTRICT COURT HAD JURISDICTION TO DEEM THEM TO BE STATE ACTORS. 7

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The United States court of appeals did not issue an opinion in this case.

The United States district court did not issue an opinion in this case.

JURISDICTION

The date on which the United States Court of Appeals decided petitioner's case was March 23, 1999.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 14, 1999, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(a) may apply. Neither the district court nor the court of appeals cer fied to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

28 U.S.C. § 2403(b) may apply. The municipal court did not certify to the State Attorney General the fact that the constitutionality of a statute of the State of California was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 USC § 1467a(c)(1)(A)(Amended 1989)
13th Amendment of the United States Constitution (Ratified 1865)

14th Amendment to the United States Constitution (Ratified 1868)

28 U.S.C. § 1254(2) (Amended 1988)
28 USCS § 1337(a) (Amended 1995)
28 USCS § 1355(Amended 1992)
28 USCS § 1361(1962)
California CCP § 26 (1872)
California CCP § 396a (Amended 1976)
California CCP§ 410.10 (1970)
California Evid. Code § 451 (a) - (e) (Amended 1986)
FRCP, Rule 11(Amended 1993)
FRCP, Rule 15 (Amended 1993)
FRCP, Rule 17 (Amended 1988)
Thomas Bane Civil Rights Act, California CC § 51.7 and 52 (1987)

STATEMENT OF THE CASE

The petitioner, a citizen of the United States and descendant of former African slaves, was served with a filed unverified complaint for unlawful detainer by the attorneys for Home Savings of America, formerly Coast Federal Bank. The case was filed in the Los Angeles Municipal Court. The California jurisdictional statutes required that the case be dismissed. That did not happen. Home Savings of America and its attorneys, PRUPAC and its attorneys, David Doi and Susan Isacoff "under color of state law" proceeded to deprive the petitioner of his constitutionally protected civil rights. At not time did the petitioner believe that he was dealing with the respondents in any capacity other than their individual capacity.

In the underlying unlawful detainer case, the respondents legislated new in order to further their invidious racially discriminatory animus. The respondent's purpose was intended to harm the petitioner, and it did. The petitioner was wrongfully

evicted and defrauded out of mandated money to move his family to a new home.

The petitioner filed a civil rights violations complaint and claims for relief and redress in the district court. The district court dismissed the petitioner's case for failure to prosecute because the petitioner would not file a 3rd amended complaint dropping respondents David Doi and Susan Isacoff from the complaint.

Petitioner believes that David Doi and Susan Isacoff are not immune from prosecution.

Petitioner filed an appeal of the district court's judgment in the Court of Appeals for the Ninth Circuit. The appeals court affirmed the lower court's judgment and denied petitioner's petition for rehearing.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN ITS DECISION TO AFFIRM THE DISTRICT COURT'S JUDGMENT BECAUSE THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER VIOLATIONS OF THE UNITED STATES CONSTITUTION AND FEDERAL BANKING LAWS AND HAD THE POWER TO ACT ON THE CASE?

The petitioner sued all the respondents in their individual, personal capacity as the caption reads in the petitioner's first amended complaint. The district court, the court of appeals and all the respondents have continued to use the defunct original complaint in violation of FRCP, Rule 15 (Amended 1993) and FRCP, Rule 17 (Amended 1988). The respondents were sued in that capacity due to conduct and purpose that constituted invidious racially discriminatory animus in a state court under color of state law because the petitioner is a descendant of former African slaves in violation of the 13th Amendment of the United States Constitution (Ratified 1865) and 14th Amendment to the United States Constitution (Ratified 1868).

Under the new rules of civil procedure, there is no pleading requirement of the stating of "facts sufficient to constitute a cause of action" but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief *** Rule 8(a) *** ...." Dioguardi v. During, US Ct App, 139 F.2d 744 (2nd Cir. 1944). The facts stated in the complaint must be sufficient to establish all the essential elements of the particular claim. FTC v. Gratz, 253 US 421, 64 L.Ed 993, 40 S.Ct 572 (1920) (overruled on other grounds by FTC v. Brown Shoe Co., 384 US 316, 16 L.Ed3d 587, 86 S.Ct 1501, 1966 CCH Trade Cases ¶ 71785). It is not necessary to plead the law relied upon. Chicago, R.I & P.R. Co. v. United States, 274 US 29, 71 L.Ed. 91, 47 S.Ct 486 (1927).

Federal question jurisdiction exists over suits for violations of federal banking laws (Peterson v. Wells Fargo Bank, 556 F.Supp 1100 (9th Cir. 1981, ND Cal.)(action alleging illegal tying arrangement prohibited by 12 USCS § 1972 (1)(C), and violation of Truth in Lending Act, 15 USCS § 1637(a)) and regulations (id.). The district court exercises jurisdiction under 28 USCS § 1337(a) (Amended 1995), 28 USCS § 1355 (Amended 1992) and 28 USCS § 1361(1962). "Certiorari goes only to the jurisdiction or the power of the court to act ...." Mannix et al. v. Superior Court in and for Sacramento County, et al., 24 P.2d 507 at 508 (Dist. Ct. App. 3rd Dist. 1933). While we agree that federal courts should not assume the task of supervision of an agency's work, we do not believe that federal courts can refuse to hear claims of deprivation of constitutional rights on the ground that the result might be a directive to an administrator to adjust procedures so as to comport with constitutional guarantees. Conley v. Gibson, 355 US 41, 78 S.Ct 99, 2 L.Ed.2d 80 (1957).

The Supremacy clause will not permit state courts to usurp functions that Congress has assigned to a federal regulatory body. Arkansas Louisiana Gas Co. v. Hall, 453 US 571, 69 L.Ed 2d 856, 101 S.Ct. 2925 (1981). The Court recognized that a "right" secured by the Supremacy Clause was a "right" protected under [42 USCS] § 1983. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed 2d 555 (1980).

It is harmful error that the district court omitted from its Report and Recommendation of United States Magistrate Judge 12 USC § 1467a(c)(1)(A) (Amended 1989)'s relationship to the California Evid. Code § 451 (a) - (e) (Amended 1986), California CCP§ 396a (Amended 1976) and the Thomas Bane Civil Rights Act, California CC § 51.7 and 52 (1987). Under the Erie doctrine , it has been established that the laws of the domiciliary state are the laws that apply. Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 812, 82 L.Ed 1188 (U.S. S. Ct. 1938).

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD NOT HAVE AFFIRMED THAT DAVID DOI AND SUSAN ISACOFF ARE NOT IMMUNE FROM PROSECUTION BECAUSE DAVID DOI AND SUSAN ISACOFF LACKED SUBJECT MATTER JURISDICTION IN THE UNDERLING UNLAWFUL DETAINER CASE, THEIR ACTIONS WERE "UNDER COLOR OF STATE LAW", AND THE DISTRICT COURT HAD JURISDICTION TO PIERCE THEIR JUDICIAL IMMUNITY.

A. David Doi and Susan Isacoff are not immune from prosecution because they lacked subject matter jurisdiction in the underlying unlawful detainer case.

The authority to exercise subject matter jurisdiction is established by operation of law. California CCP § 26 (1872). A court of the state of California may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States. California CCP§ 410.10 (1970). In order for the authority to exercise subject matter jurisdiction in the underlying unlawful detainer case filed by respondents Home Savings of America and its attorneys to vest in David Doi or Susan Isacoff, the complaint must have been verified and if it were not verified, which is was not in this case, must have been dismissed. California CCP § 396a (Amended 1976). In this case neither David Doi nor Susan Isacoff dismissed the case. What they did do was start a trial.

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the

> subject matter. Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. Bradley v. Fisher 80 US Reports 335, 351 - 352 (S.Ct. DCC 1871).
>
> The thing to be done does not derive its character from the individual who does it. If it be not, by reason of its attributes, judicial, it does not become judicial by being performed by a judicial officer. Hence it is that the nature of the act must be sought in its attributes and qualities, apart from the official title of the actor. City of Baltimore v. Bonaparte, 48 A. 735, 737, 93 Md 165 (1901).

B. David Doi and Susan Isacoff should not be immune from prosecution because their actions were "under color of state law", and the district court had the jurisdiction to pierce their judicial immunity.

> The Supreme Court has stated that "conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law." (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 n. 18 (1982)). In Lugar, the Court established a two-part state action test to determine if conduct that allegedly caused the deprivation of a federal right could be fairly attributable to the State. The two requirements are that: First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. Fred Meyer, Inc. v. Casey, 67 F.3d 1412 (9th Cir. 1995) (citing Lugar v. Edmonson Oil Co., 457 U.S. 22, at 937).

In not dismissing the underlying unlawful detainer case and starting a trial, David Doi and Susan Isacoff legislated new law in the underlying unlawful detainer case.

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. Prentis v. Atlantic Coast Line Co., 211 US 210 at 226, 29 S.Ct 67, 69, 53 L.Ed 150 (Oct. 1908) .

The petitioner never believed that he was dealing with David Doi or Susan Isacoff in their judicial capacity.

III. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED WHEN IT AFFIRMED THAT THE REMAINING RESPONDENTS ARE NOT STATE ACTORS FOR THE PURPOSE OF THE PETITIONER'S 42 U.S.C. §§ 1981, 1983, 1985 AND 1986 REDRESSABLE CLAIMS BECAUSE THE DISTRICT COURT HAD JURISDICTION TO DEEM THEM TO BE STATE ACTORS.

It is possible that a symbiotic relationship between state and private enterprise could give rise to state action for purposes of Fourteenth Amendment due process; in the absence of such relationship, state action still might be found if the state is closely involved in the very activity challenged. Fitzgerald v. Mountain Laurel Racing Inc., 607 F.2d 589, cert. Denied, 446 US 956, 64 L.Ed 2d 814, 100 S Ct 2927 (1979, CA3 Pa).

> We held that there is state action whenever the State has so far insinuated itself into a position of interdependence [with otherwise private persons whose conduct is said to violate the Fourteenth Amendment] ... that is must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so purely private as to fall with out the scope of the Fourteenth Amendment. Burton v. Wilmington Parking Authority, 365 U.S. 715 at 725 (1961).

42 USC § 1985 prohibits five different kinds of conspiracies. Lilley v. State of MO, 920 F.Supp. 1035 at 1045 (1996). The third is: conspiracies to interfere with the

administration of justice in state courts (second clause of § 1985 (2)). Id. The fourth is: private conspiracies to deny any person the enjoyment of "equal protection of the laws" and "equal privileges and immunities under the laws" (first clause of § 1985(3)). Id.

> To state a claim of conspiracy under [42 USC,] Section 1985(3), the plaintiff must allege four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States (cites omitted). Eidson v. Arenas, 910 F.Supp. 609 at 613 (M.D. Fla. 1995). If the law be such a law that persons placing themselves in the position contemplated by the law must take notice of it at their peril, it is a public law. Crawford v. Linn County, 5 P.738, 747, 11 Or. 482 (1885). The nexus of the conspiracy between the respondents was California CCP § 396a. On or about May 12, 1997, the respondents affirmatively acted in furtherance of the conspiracy to deprive the petitioner of his property and his rights and privileges of a citizen of the United States. In furtherance of the conspiracy, respondent PRUPAC failed to respond in a timely manner to a properly issued subpena duces tecum, and its attorneys filed an improper and untimely Motion to Quash. The affirmative actions of all the respondents resulted in the tortious eviction of the petitioner that resulted in the petitioner suffering mental anguish, pain and physical injury. Richardson v. Pridmore, 97 Cal. App. 2d 124, 129, 217 P.2d 113 (1950).

IV. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ABUSED ITS DISCRETION WHEN IT FAILED TO MANDATE THAT THE DISTRICT COURT SANCTION ALL THE RESPONDENTS AND THEIR ATTORNEYS FOR RULE 11 VIOLATIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE BECAUSE THE DISTRICT COURT HAD THE JURISDICTION TO SANCTION THEM.

FRCP, Rule 11 (b)(1) prohibits representations to the court that are "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation." FRCP, Rule 11. It was evident on the face of all the papers filed by all the respondents and their attorneys in the district court and the court of appeals that their papers were frivolous and had no basis in law and were intended to harass the petitioner and cause unnecessary delay and needless increase in the cost of litigation. The purpose of respondents' filing of their frivolous papers was to further the conspiracy to deprive the petitioner of his 13th and 14th Amendment rights.

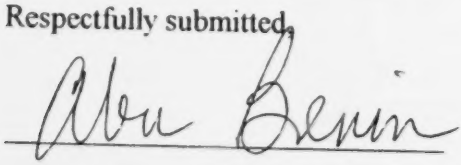
The district court has jurisdiction to sanction parties and their attorneys for violations of FRCP, Rule 11(b)(1). 28 USC § 1337(a); 28 USC § 1355. The court of appeals has the power to mandate that the district court sanction the respondents and failed to exercise that power in this case. The Supreme Court may issue a writ of mandamus in aid of the appellate jurisdiction that might otherwise be defeated by the unauthorized action of the court below. McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501, 503, 54 L.Ed. 762 (1910).

Ad rectum.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: October 11, 1999

APPENDIX A -- Order denying timely filed petition for rehearing

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ABU BENIN,	)
	) No. 98-55953
Plaintiff-Appellant,	)
	) DC# CV-97-6763-HLH
v.	) Central California
	) (Los Angeles)
HOME SAVINGS OF AMERICA, FSB, et al.,	) ORDER
	)
Defendants-Appellees.	)
	)

Before: GOODWIN, KOZINSKI, and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judge Kozinski votes to deny the petition for rehearing en banc, and Judges Goodwin and Leavy so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is denied.

APPENDIX B -- 28 U.S.C § 1254(2) (Amended 1988). Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX C -- FRCP, Rule 15 (Amended 1993). Amended and Supplemental Pleadings

(a) Amendments.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

APPENDIX D -- FRCP, Rule 17 (Amended 1988) Parties Plaintiff and Defendant; Capacity

(b) Capacity to Sue or be Sued.

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a).

APPENDIX E -- 13th Amendment to the United States Constitution (Ratified 1865)

Section 1.
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Section 2.
Congress shall have power to enforce this article by appropriate legislation

APPENDIX F -- 14th Amendment to the United States Constitution (Ratified 1868)
Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G -- 28 USCS § 1337(a). Commerce and antitrust regulations; amount in controversy, costs (Amended 1995)

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

APPENDIX H -- 28 USCS § 1355. Fine, penalty or forfeiture (Amended 1992)

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

APPENDIX I -- 28 USCS § 1361. Action to compel an officer of the United States to perform his duty (1962)
The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

APPENDIX J -- Report and Recommendation of the United States Magistrate Judge (Benin v. Coast Federal Bank, et al. U.S.D.C No. CV 97-6763-HLH, filed March 4, 1998)

FILED
CLERK, U.S. DISTRICT COURT
MAR - 4 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ABU BENIN Plaintiff, v. COAST FEDERAL BANK, et al., Defendants.	) NO. CV 97-6763-HLH (E)))) REPORT AND) RECOMMENDATION OF) UNITED STATES) MAGISTRATE JUDGE))

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

The Court dismissed Plaintiff's First Amended Complaint with leave to amend as to all claims except as to those claims alleged

against Defendants David Doi and Susan E. Isacoff; all claims alleged against Defendants Doi and Isacoff were dismissed without leave to amend. See Memorandum and Order, filed January 12, 1998, a copy of which is attached hereto and incorporated by reference herein. 1/

This Memorandum and Order cautioned Plaintiff that failure to file a Third Amended Complaint 2/ within (30) days of the Memorandum and Order "may result in a recommendation that this action be dismissed for failure to prosecute." Plaintiff did not file a Third Amended Complaint within the allotted time.

DISCUSSION

This action should be dismissed without prejudice. The

1/ On February 24, 1998, the Court denied Plaintiff's "Motion for Reconsideration of the Decision to Dismiss Defendants David Doi and Susan E. Isacoff."

2/ The Court previously denied leave to file a "Second Amended Complaint," lodged with the Court on December 23, 1997.

First Amended Complaint is defective for the reasons stated in the attached memorandum and Order. Plaintiff did not file a Third Amended Complaint within the allotted time. The Court has inherent power to achieve the orderly and expeditious disposition of cases by dismissing actions for failure to prosecute. Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962); see Fed. R. C.V. P. 41(b).

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing the action as to Defendants David Doi and Susan E. Isacoff with prejudice and dismissing the action as to the remaining Defendants without prejudice.

DATE: March 4, 1998

"s/ CHARLES F. EICK"
UNITED STATES MAGISTRATE JUDGE

APPENDIX K -- 12 USC § 1467a(c)(1)(A) (Amended 1989)
c) Holding company activities
(1) Prohibited activities
Except as otherwise provided in this subsection, no savings and loan holding company and no subsidiary which is not a savings association shall -
(A) engage in any activity or render any service for or on behalf of a savings association subsidiary for the purpose or with the effect of evading any law or regulation applicable to such savings association;

APPENDIX L -- California Evidence Code §451(a) -(e). Matters which must be judicially noticed (Amended 1986)
Judicial notice shall be taken of the following: (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution. (b) Any matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the Government Code or by Section 1507 of Title 44 of the United States Code. © Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this state adopted by the Judicial Council. (d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy. (e) The true signification of all English words and phrases and of all legal expressions.

APPENDIX M -- California Code of Civil Procedure § 396a.
Justice or municipal courts; statement of jurisdictional facts; transfers; consent to retention of case (Amended 1976)
In a limited civil case that is subject to Sections 1812.10 and 2984.4 of the Civil Code, or subdivision (b) of Section 395 of the Code of Civil Procedure, or is an action or proceeding for an unlawful detainer as defined in Section 1161 of the Code of Civil Procedure, the plaintiff shall state facts in the complaint, verified by the

plaintiff's oath, or the oath of the plaintiff's attorney, or in an affidavit of the plaintiff or of the plaintiff's attorney filed with the complaint, showing that the action has been commenced in the proper court for the trial of the action or proceeding, and showing that the action is subject to the provisions of Sections 1812.10 and 2984.4 of the Civil Code or subdivision (b) of Section 395 of the Code of Civil Procedure, or is an action for an unlawful detainer. When the affidavit is filed with the complaint, a copy thereof shall be served with the summons. Except as herein provided, if the complaint or affidavit be not so filed, no further proceedings shall be had in the action or proceeding, except to dismiss the same without prejudice. However, the court may, on such terms as may be just, permit the affidavit to be filed subsequent to the filing of the complaint, and a copy of the affidavit shall be served on the defendant and the time to answer or otherwise plead shall date from that service. If it appears from the complaint or affidavit, or otherwise, that the court in which the action or proceeding is commenced is not the proper court for the trial thereof, the court in which the action or proceeding is commenced, or a judge thereof, shall, whenever that fact appears, transfer it to the proper court, on its own motion, or on motion of the defendant, unless the defendant consents in writing, or in open court (consent in open court being entered in the minutes or docket of the court), to the keeping of the action or proceeding in the court where commenced. If that consent be given, the action or proceeding may continue in the court where commenced. Notwithstanding the provisions of Section 1801.1 and subdivision (f) of Section 2983.7 of the Civil Code, that consent may be given by a defendant who is represented by counsel at the time the consent is given, and where an action or proceeding is subject to subdivision (b) of Section 395 or is for an unlawful detainer, that consent may only be given by a defendant who is represented by counsel at the time the consent is given. In any case where the transfer of the action or proceeding is ordered under the provisions of this paragraph, if summons is served prior to the filing of the action or proceeding in the court to which it is transferred, as to any defendant, so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead shall date from service upon that defendant of written notice of the filing. When it appears from the complaint or affidavit of the plaintiff that the court

in which the action or proceeding is commenced is a proper court for the trial thereof, all proper proceedings may be had, and the action or proceeding may be tried therein; provided, however, that a motion for a transfer of the action or proceeding may be made as in other cases, within the time, upon the grounds, and in the manner provided in this title, and if upon that motion it appears that the action or proceeding is not pending in the proper court, or should for other cause be transferred, the same shall be ordered transferred as provided in this title. When any action or proceeding is ordered transferred as herein provided, proceedings shall be had, and the costs and fees shall be paid, as provided in Sections 398 and 399 of this code.

APPENDIX N -- Thomas Bane Civil Rights Act, California Civil Code § 51.7. Freedom from violence or intimidation (1987)
(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.

APPENDIX O -- Thomas Bane Civil Rights Act, California Civil Code § 52. Denial of civil rights or discrimination; damages; civil action by people or persons aggrieved; intervention (1987)
(b) Whoever denies the right provided by Section 51.7, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following: (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages. (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7. (3) Attorney's fees as may be determined by the court.
© Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full

enjoyment of any of the rights hereby secured, and that conduct is of that nature and is intended to deny the full exercise of the rights herein described, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following: (1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved. (2) The facts pertaining to the conduct. (3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to insure the full enjoyment of the rights herein described. (e) Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved party. (h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law. 52.1. (a) Whenever a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. (b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured. © An action brought pursuant to subdivision (a) or (b) may be filed either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which a person whose conduct complained of

resides or has his or her place of business. An action brought by the Attorney General pursuant to subdivision (a) also may be filed in the superior court for any county wherein the Attorney General has an office, and in such a case, the jurisdiction of the court shall extend throughout the state. (d) Whenever a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to subdivision (a) or (b), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.9 OF THE PENAL CODE. (e) The court shall order the plaintiff or the attorney for the plaintiff to deliver, or the county clerk to mail, two copies of any order, extension, modification, or termination thereof granted pursuant to this section, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency having jurisdiction over the residence of the plaintiff and any other locations where the court determines that acts of violence against the plaintiff are likely to occur. Those local law enforcement agencies shall be designated by the plaintiff or the attorney for the plaintiff. Each appropriate law enforcement agency receiving any order, extension, or modification of any order issued pursuant to this section shall serve forthwith one copy thereof upon the defendant. Each appropriate law enforcement agency shall provide to any law enforcement officer responding to the scene of reported violence, information as to the existence of, terms, and current status of, any order issued pursuant to this section. (f) A court shall not have jurisdiction to issue an order or injunction under this section, if that order or injunction would be prohibited under Section 527.3 of the Code of Civil Procedure. (g) Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved person under any other provision of law. (h) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court may award the petitioner or plaintiff reasonable attorney's fees. (I) A violation of an order described in subdivision (d) may be punished either by prosecution under Section 422.9 of the Penal Code, or by a proceeding for contempt brought pursuant to Title 5 (commencing with Section 1209) of Part 3 of the Code of Civil Procedure. However, in any

such proceeding pursuant to the Code of Civil Procedure, if it be determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed not exceeding one thousand dollars ($1,000), or the person may be ordered imprisoned in a county jail not exceeding six months, or the court may order both the imprisonment and fine. (j) Speech alone shall not be sufficient to support an action under subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat. (k) No order issued in any proceeding under subdivision (a) or (b) shall restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech shall do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined. 52.2. An action pursuant to Section 52 or 54.3 may be brought in any court of competent jurisdiction. A "court of competent jurisdiction" shall include small claims court if the amount of the damages sought in the action does not exceed five thousand dollars ($5,000).

APPENDIX P -- California Code of Civil Procedure § 26.
Obligation defined (1872)
An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from: One--Contract; or, Two--Operation of law.

APPENDIX Q -- California Code of Civil Procedure § 410.10
Basis (1970)
A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

APPENDIX R -- FRCP, Rule 11(Amended 1993). Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature.

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5 , but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Supreme Court, U.S.
FILED
99 736 OCT 12 1999
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

ABU BENIN,

Petitioner,

v.

HOME SAVINGS OF AMERICA, FSB, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ABU BENIN
Petitioner, Pro Se
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INDEX TO SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A -- Memorandum from the United States Court of Appeals for the Ninth Circuit in the case of Abu Benin v. Home Savings of American FSB, et al. ,Case No. 98-55952, filed March 23, 1999.

SUPPLEMENTAL APPENDIX B -- Memorandum and Order from the United States District Court Central District of California in the case of Abu Benin v. Coast Federal Bank, et al. ,Case No. CV 97-6763-HLH, filed January 12, 1997.

Respectfully submitted,

Abu Benin

Date: October 25, 1999

SUPPLEMENTAL APPENDIX A

FILED
MAR 23 1999
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ABU BENIN, Plaintiff-Appellant, v. HOME SAVINGS OF AMERICA, FSB; H.F. AHMANSON & CO.; GEOFFREY G. OLSEN, a Member of the California State Bar, an Individual; MCKINLEY & CAPELOTO, Business form unknown; J. SHELDON CAPELOTO, a Member of the California State Bar and an Individual; ELIZABETH A. LOSSING, a Member of the California State Bar and an Individual; PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY,	No. 98-55952 D.C. No. CV-97-6763-HLH MEMORANDUM [1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Business Entity Form Unknown; PRUDENTIAL INSURANCE COMPANY OF NORTH AMERICA, a Holding Company; BERGER, KAHN, SHAFTON, MOSS, FIGLER, SIMON & GLADSTONE, A Professional Corporation; PATRICK E. NAUGHTON, a Member of the California State Bar and an Individual; JULIE R. BEATON, a Member of the California State Bar and an Individual; DAVID DOI, Judge, a Municipal Court Judge, a Member of the California State Bar and an Individual; SUSAN ISACOFF, Judge, a Municipal Court Judge, a Member of the California State Bar and an Individual; MAXWELL JOUANICOT, an Individual; DANIELLE D. CYR, an Individual; DOES, 1 through 50 inclusive,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Submitted March 15, 1999[2]

Before: GOODWIN, KOZINSKI, and LEAVY, Circuit Judges.

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[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a).

Abu Benin appeals pro se the district court's dismissal of his action alleging that defendants violated his constitutional rights in an underlying state court unlawful detainer action instituted against Benin. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *see Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1413 (9th Cir. 1995), and may affirm on any basis supported by the record, *see Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995). We affirm.

The district court properly dismissed Benin's amended complaint because his claims against the state court judges are barred by judicial immunity, *see Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996), and his § 1983 claims fail because the remaining defendants are not state actors, *see Fred Meyer, Inc.*, 67 F.3d at 1413-15. Benin also failed to allege sufficient facts to state cognizable claims under 42 U.S.C. §§ 1981, 1985, 1986.[3]

Benin's pending motions are denied.

AFFIRMED.

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[3] Although the district court afforded Benin an opportunity to amend these claims, he elected not to do so. Consequently, the case was dismissed for failure to prosecute.

SUPPLEMENTAL APPENDIX B

FILED
CLERK, U.S. DISTRICT COURT
JAN 12 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ABU BENIN, Plaintiff, v. COAST FEDERAL BANK, etc, et al., Defendants.	Case No. CV 97-6763-HLH MEMORANDUM AND ORDER

For the reasons discussed below, Plaintiff's First Amended Complaint is dismissed with leave to amend. If Plaintiff still wishes to pursue this action, he is granted thirty (30) days from the date of this Memorandum and Order within which to file a Third Amended

Complaint, attempting to cure the defects in the First Amended Complaint described herein.[1/] The Third Amended Complaint shall be complete in itself. It shall not refer in any manner to prior Complaints. Failure to file timely a Third Amended Complaint may result in a recommendation that this action be dismissed for failure to prosecute.

PROCEEDINGS

Plaintiff filed a Complaint on September 10, 1997. Various Defendants filed motions to dismiss the Complaint ("original motions to dismiss"). On November 14, 1997, while the original motions to dismiss were pending, Plaintiff filed a First Amended Complaint. The Court deemed moot the original motions to dismiss (See Minute Order dated November 20, 1997).

1/ On December 23, 1997, Plaintiff lodged with the Court a "[Proposed] Second Amended Complaint." The Proposed Second Amended Complaint does not cure the deficiencies found in the First Amended Complaint as discussed herein. Therefore, Plaintiff's Motion for Leave to File the [Proposed] Second Amended Complaint is denied.

On November 26, 1997, Defendants McKinley & Capeloto, J. Sheldon Capeloto, Elizabeth A. Lossing, Danielle D. Cyr, and Maxwell J. Jouanicot filed a Motion to Dismiss. Also on November 26, 1997, Defendants Judges David Doi and Susan E. Isacoff filed a Motion to Dismiss. On December 2, 1997, Defendants Prudential Property and Casualty Insurance Company, The Prudential Insurance Company of America, Berger, Kahn, Shafton, Moss Figler, Simon & Gladstone, Patrick E. Naughton, and Julie Beaton filed a Motion Dismiss. On December 9, 1997, Defendants Coast Federal Bank, Geoffrey Olsen, and Coast Savings Financial, Inc. filed a Motion to Dismiss (collectively, Defendants and "Motions to Dismiss").

On December 23, 1997, Plaintiff filed a "Notice of Non-Opposition, etc." to the Motions to Dismiss, and concurrently requested leave to file a [Proposed] Second Amended Complaint. Defendants oppose Plaintiff's request for leave to file a [Proposed] Second Amended Complaint (See oppositions filed December 31, 1997, January 5, 1998, and January 7, 1998). Plaintiff filed a "Reply to Defendants' Opposition, etc." on January 8, 1998. The

Court has taken these matters under submission without oral argument.

DISCUSSION

1. Judges David Doi and Susan E. Isacoff Possess Judicial Immunity.

The First Amended Complaint names Judges David Doi and Susan E. Isacoff as Defendants (First Amended Complaint "FAC" ¶¶ 22, 23). The judges are immune from suit in this case.

The scope of judicial immunity is broadly construed. Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986) ("Ashelman"). A judge is immune from suit unless: (1) the challenged action was "not taken in the judge's judicial capacity"; or (2) the challenged action was taken "in the complete absence of all jurisdiction." Mireles v. Waco, 502 U.S. 9, 11 (1991). Neither

exception applies in the present case. [2]

An action is within a judge's "judicial capacity" if the action involves "a function normally performed by a judge." Id. A fraudulent or corrupt motive underlying performance of a judicial function does not destroy judicial immunity. Forrester v. White, 484 U.S. 219, 227 (1988) ("[a judicial act] does not become less judicial by virtue of an allegation of malice or corruption of motive"); Ashelman, 793 F.2d at 1078 (conspiracy between judge and lawyer "to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges").

The First Amended Complaint alleges Judge David Doi required Plaintiff to pay jury fees daily (FAC ¶¶ 33-40). Decisions regarding jury fees are functions normally performed by a judge. See Turlock Golf and Country Club v. Superior Ct. of Stanislaus

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[2] Plaintiff has not, and apparently cannot, allege the judges lacked jurisdiction to act in the underlying state case.

County, 240 Cal. App. 2d 693, 699, 50 Cal. Rptr. 70, 74 (1966); see also Cal. Civ. Proc. Code § 631; Cal. Rule of Ct. § 377. Accordingly, Judge Doi is entitled to judicial immunity. All claims against Judge Doi are dismissed without leave to amend.

The First Amended Complaint alleges Judge Isacoff: (1) informed Plaintiff that he would be treated "like an attorney" (FAC ¶ 49); (2) proceeded without seeing the proof of service for certain documents (FAC ¶¶ 57-58); (3) refused to enforce a subpoena duces tecum (FAC ¶¶ 59-60); (4) refused to take "judicial notice of certain laws and facts" (FAC ¶¶ 61-62); (5) refused to give Plaintiff time to review motions in limine (FAC ¶¶ 63-64); (6) eliminated Plaintiff's affirmative defenses (FAC ¶ 65); (7) informed Plaintiff that $500.00 was "a very generous offer" to settle (FAC ¶¶ 66-68); and (8) informed Plaintiff that he was wasting court time and instructed Plaintiff to enter settlement negotiations (FAC ¶¶ 69-70). Even assuming the allegations in the First Amended Complaint are true, the allegations implicate only functions normally performed by a judge. See generally Mireles, v. Waco, 502 U.S. 9, 11-13 (1991); Nelson v. Gaunt, 125 Cal. App. 3d 623, 638, 178 Cal. Rptr. 167,

175 (1981) ("When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys."); Cal. Rule of Ct. § 222 (trial court may require parties to attend mandatory settlement conferences). Accordingly, Judge Isacoff is entitled to judicial immunity. All claims against Judge Isacoff are dismissed without leave to amend.

2. The First Amended Complaint Fails to State a Claim Under Title 42 U.S.C. Section 1983.

Plaintiff's First Amended Complaint attempts to allege a violation of 42 U.S.C. section 1983 (FAC at 1). In order for a plaintiff to state a claim under section 1983, the plaintiff must allege, inter alia, the defendant was acting under color of state law at the time the complained of act was committed. Parrat v. Taylor, 451 U.S. 527, 535 (1981); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988). The actions of private individuals and entities not affiliated with state or municipal government generally do not involve state action. See Flagg Bros.,

Inc. v. Brooks, 436 U.S. 149, 156 (1978); Associates and Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 134-36 (9th Cir. 1971).

A private individual who conspires with state officials acts "under color of" state law. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (corrupt conspiracy between litigant and judge). The private conspirator acts "under color of" state law even if the involved state official is immune from suit. Id. at 28.

In the present case, all Defendants, except Defendant Judges Doi and Isacoff, are private individuals, not state actors. To the extent Plaintiff is attempting to bring these private Defendants within the ambit of a section 1983 claim by alleging the private Defendants conspired with state actors, Plaintiff has failed to state a claim (FAC ¶¶ 112, 114, 116, 118, 120, 122, 136 & 138). Plaintiff has failed to allege any facts regarding an alleged conspiracy between the private Defendants and state actors. Conclusory allegations are insufficient. See Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989); Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984) ("In conspiracy cases, a defendant must be informed of the

nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed."); Jones v. Community Dev. Agency, 733 F.2d 646, 649 (9th Cir. 1984); Ivey v. Board of Regents of Univ. of Alaska, 673 F. 2d 266, 268 (9th Cir. 1982); Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965), cert. denied, 382 U.S. 966 (1965).

Because Plaintiff has failed to allege state action sufficiently, he has failed to state a claim for a violation of 42 U.S.C. section 1983. Plaintiff's section 1983 claim is dismissed with leave to amend.

3. Plaintiff's Related Constitutional Claims Fail as a Matter of Law.

Plaintiff attempts to allege violations of the Thirteenth and Fourteenth Amendments (FAC ¶¶ 100-123, 136-139). Because Plaintiff has not alleged sufficiently a section 1983 claim, Plaintiff's constitutional claims also must be dismissed. See Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992), cert.

denied, 506 U.S. 1081 (1993) ("Plaintiff has no cause of action directly under the United States Constitution, . . . a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. section 1983."); see also Golden Gate Hotel Assoc. V. City of San Francisco, 18 F.3d 1482, 1486-87 (9th Cir. 1994).

4. The First Amended Complaint Fails To State A Claim Under Title 42 U.S.C. 1981.

Plaintiff appears to attempt to allege a violation of 42 U.S.C. section 1981 (FAC at 1). Section 1981 "provide[s] a cause of action for deprivation of a contract right" based upon race. Carrero v. New York City Housing Authority, 890 F.2d 569, 575 (2nd Cir. 1989). The First Amended Complaint fails to allege Defendants deprived Plaintiff of the right to contract; to the contrary, the First Amended Complaint appears to allege Plaintiff desires to rescind a contract into which he entered (FAC ¶¶ 71, 82). Thus, Plaintiff's 42 U.S.C. section 1981 claim is dismissed with leave to amend.

5. The First Amended Complaint Fails To State a Claim Under Title 42 U.S.C. Section 1985 or 1986.

Plaintiff appears to attempt to allege violations of 42 U.S.C. sections 1985 and 1986 (FAC at 1). These statutes refer to a conspiracy intending to interfere with an individual's civil rights. 42 U.S.C. §§ 1985, 1986.

"To state a claim for conspiracy, a plaintiff must allege the agreement of each defendant to the operation of the conspiracy . . . . A complaint may be dismissed if it contains only conclusory, vague and general allegations of conspiracy." See Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1137 (7th Cir. 1987), cert. denied, 486 U.S. 1026 (1988) (internal citations omitted); Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984) ("In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed.").

As discussed above, the First Amended Complaint alleges no facts regarding a conspiracy. Thus, Plaintiff's section 1985 and 1986 claims are dismissed with leave to amend.

6. Fictitiously Named Defendants May Be Dismissed.

The First Amended Complaint names as Defendants "Does 1-50" (FAC ¶ 24). As a general rule, the use of fictitiously named defendants is disfavored in federal court. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). Unidentifiable doe defendants may be dismissed from the complaint. See id.; McConnell v. Marine Eng'rs Beneficial Ass'n, 526 F. Supp. 770, 774 (N.D. Cal. 1981).

7. The Court May Decline Supplemental Jurisdiction.

Plaintiff alleges various state law claims (FAC ¶¶ 124-33, 140-43). A federal court may decline supplemental jurisdiction and dismiss state law claims if no viable federal claims exists. See Voigt v. Savell, 70 F.3d 1552, 1565 (9th Cir. 1995), cert. denied, 116 S. Ct. 1826 (1996); Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d

1303, 1309 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993); United Mine Workers v. Gibbs, 383 U.S. 715 (1966); 28 U.S.C. § 1367(c).

CONCLUSION

A complaint filed pro se may be dismissed without leave to amend where "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quotations omitted); see Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (dismissal with prejudice is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief"). It appears that dismissal of the entire action with prejudice may be appropriate. However, the Court will exercise its discretion to grant Plaintiff an opportunity to amend as to all defendants other than Judges Doi and Isacoff by filing a Third Amended Complaint. Plaintiff may not amend his claims as to Judges Doi or Isacoff. Plaintiff shall not attempt to add

additional defendants (or additional plaintiffs) without leave of Court. See Fed. R. Civ. P. 21.

IT IS ORDERED that the Clerk serve forthwith a copy of this Order on Plaintiff and counsel for Defendants.

DATED: Jan 12, 1998.

"s/Harry L. Hupp"
HARRY L. HUPP
UNITED STATES DISTRICT JUDGE

PRESENTED this 9th day of January, 1998 by:

"s/Charles F. Eick"
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE